
(2010) 03 DEL CK 0420

In the Delhi High Court

Case No : CM (M) No. 593 of 2008 and CM No. 7111 of 2008

Shri Rehmat Ullah (Deceased) thru. L.Rs.

APPELLANT

Vs

Mst. Hassan Bano and Others

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2010) 03 DEL CK 0420

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : T.N. Saxena and V.K. Singh, for the Appellant; V.B. Andley and Rajinder Mathur, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.—By this petition under Article 227 of the Constitution of India, the petitioner has assailed an order dated 11th December, 2007 passed by the learned ADJ dismissing appeal of the petitioner against order of learned Civil Judge, dismissing an application made by the petitioner for passing a final decree.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner was mortgagor of property bearing municipal No. 757, 758, 759, 760, 762 & 763 Ward IX, Kabari Bazar, Jama Masjid, Delhi. The petitioner had mortgaged this property to the defendants/respondents for sum of Rs. 12,000/- sometime in 1972. The petitioner thereafter filed a suit for redemption of mortgage on the ground that the petitioner had paid the mortgage amount. In the suit filed by the petitioner, Commercial Civil Judge passed a preliminary decree on 21st August, 1982 in favour of the petitioner and allowed closure of mortgage. However, he gave directions that the accounts be taken as to what were the dues to the defendant on the date of the decree for:

1. Principal and interest on the mortgage @ 7 1/2 p.a.

2. Cost of the suit.

3. Other costs and charges probably incurred by defendant up to the date in respect of mortgage security together with interest thereon.

4. An account of any loss or damage caused to the mortgaged property by any act of omission or commission of the defendants destructive or permanently injurious to the property.

3. After passing such an order and giving directions for adjustment of the amount due against the plaintiff to the amount due against the defendant, the learned Civil Judge appointed Shri Jaspal Singh advocate as Local Commissioner and he was to do the accounting within six months from the date of passing of the judgment. His fee was fixed as Rs. 1000/- to be paid by the plaintiff. The plaintiff did not pay the fee of the Local Commissioner and no accounting was done. After 13 years of passing of this preliminary decree, plaintiff filed application for passing of final decree on the ground that all the tenants in the property had already become direct tenant with him and they were paying rent to him and the plaintiff was already in possession of the property mortgaged to the defendant. It was also contended that while passing of preliminary decree, the Court had already held that entire consideration of the mortgage amount had been paid by the mortgagor/plaintiff to the defendant No. 1 & 2 and the original documents of title were on the Court file. He submitted that no steps were taken to get accounting done through Shri Jaspal Singh, Advocate as defendants No. 3-8 had become direct tenants under the plaintiff and no further accounting was required to be done.

4. The defendant took objection that since the application had been filed after 13 years of passing of preliminary decree and Local Commissioner was not paid fee and thus no accounting done, the final decree should not be passed and the application should be dismissed. The learned Civil Judge after noting the requirements of Order 34 CPC observed that the Court had to follow the procedure as prescribed under Order 34 CPC and the final decree could be passed only after taking of accounts of sums due to the defendant by the date of decree and thereafter only, the Court could direct the defendant to deliver onto the plaintiff the documents in his possession or power relating to mortgage. The trial Court observed that since plaintiff failed to comply with the Order of the Court relating to rendition of accounts and had rather sought final decree after 13 years beyond the period of 12 years, the application was dismissed. The learned Appellate Court after noting the order passed by the trial Court upheld the order of the trial Court giving the same reasoning.

5. It was not controverted before the Civil Court or the Appellate Court that the property which was mortgaged by the plaintiff was already in possession of the plaintiff and all the tenants had become direct tenants under him. Neither it was controverted before the Civil Judge or before the Appellate Court that the Commercial Sub Judge in his order dated 21st August, 1982 had already held that the mortgage amount had already been paid thus the only accounting to be done between the plaintiff and defendant was in respect of rent received by the

defendant and about the cost of the suit. As per Order 34 CPC, if the plaintiff, who applies for redemption of mortgage succeeds, he is entitled for costs of the suit. Thus, the costs of the suit were payable by the defendant to the plaintiff. The accounting was also to be done in respect of the rent. It was also not disputed that all the tenants had already become direct tenants under the plaintiff after the preliminary decree passed by the Court. Accounting is not a ritual prescribed under Code of Civil Procedure, which is to be performed by the parties before passing of a decree and there is no law that if this ritual is not performed final decree cannot be passed. The purpose of accounting is to settle the accounts between the parties in respect of the mortgaged property and in case some money is recoverable by the plaintiff or by the defendant, the same should be paid. Once the Court has held that the mortgage amount along with interest had been paid and it was a fact that the defendant/mortgagee was receiving rent from the tenants prior to filing of the suit, the only accounting which was to be done was in respect of the rent, damage to the property and the costs of the suit. It is not the case of the defendant that anything was payable by the plaintiff to defendant, neither this was pleaded either before the Civil Court or the before the Appellate Court. Even the fact that the documents of title of the property were lying with the Court were not disputed. Since the title deeds were not with the defendant, under these circumstances, I consider that the Civil Court as well as the Appellate court failed to exercise their jurisdiction in respect of redemption of mortgage. In case of mortgage no limitation applies. A mortgager can be debarred from right to redeem the property when the mortgagee applies for a final decree debarring the mortgager from his right to redeem on account of not paying the due amount within the prescribed period as directed by the Court. If no due amount is to be paid and no application has been made by the mortgagee for passing a final decree in his favour closing the right to redeem, the mortgager is at liberty to move an application for passing a final decree in his favour by making a statement that he does not want to recover any money from the defendant and he forgoes his claim against the defendant.

6. It was not necessary for the petitioner to pay fee of the Local Commissioner and get accounting done through the Local Commissioner unless the petitioner was keen to receive dues from the defendant. Since the rent in this case was very meager and fee of the Local Commissioner as fixed being Rs. 1,000/-, looked more than what the plaintiff could have recovered, the plaintiff was justified in not paying fee of the Local Commissioner and not getting the accounts done. It had not been the case of the defendant that defendant had to recover any amount from the plaintiff. It is not even the case of the defendant that tenants had not started paying rent to petitioner after passing of the preliminary decree and they had not become tenant under the plaintiff. Under these circumstances I consider that the plaintiff was entitled for a final decree from the Court below.

7. Mhadagonda Ramgonda Patil and Others Vs. Shripal Balwant Rainade and Others, Supreme Court observed that a mortgager has a right to file even second

suit if he failed to make payment within the specified period under the preliminary decree and his right to redeem has not been closed. I, therefore consider that since a mortgager could file even a second suit for redemption of mortgage, if he had failed to pay money in accordance with earlier preliminary decree, there is no reason that the Civil Court or the ADJ could deny the right to the petitioner of obtaining a final decree, since it was not the defendant who was to receive money from the plaintiff (petitioner herein) but it was plaintiff who was to receive money from the defendant after accounting and the plaintiff was prepared to forego this money.

8. The petition is therefore allowed. The order dated 3rd January, 2000 of learned Civil Court and order dated 11th December, 2007 of the Appellate Court are set aside. The Civil Court is directed to pass an appropriate order regarding final decree in the light of this judgment.

Parties to appear before the trial Court on 15th April, 2010.